HULL & HULL LLP
Barristers and Solicitors

ESTATE, TRUST AND CAPACITY LAW BREAKFAST SERIES

The Moment of Death and Beyond: Preliminary Duties of the Estate Trustee

Ian M. Hull

Direct Dial: (416) 369-7826
Fax: (416) 369-1517
E-mail: ihull@hullandhull.com

Suzana Popovic-Montag

Direct Dial: (416) 369-1416
Fax: (416) 369-1517
E-mail: spopovic@hullandhull.com

Moira Visoiu

Direct Dial: (416) 640-1516
Fax: (416) 369-1517
E:mail: mvisoiu@hullandhull.com

Robert Turner

Direct Dial: (905) 628-6412
Fax: (905) 628-6460
E:mail: info@catteleatonandchambers.ca

HULL & HULL LLP
Barristers and Solicitors
141 Adelaide Street West, Suite 1700
Toronto, Ontario M5H 3L5
TEL: (416) 369-1140
FAX: (416) 369-1517

CATTEL, EATON & CHAMBERS
53 Main Street
Dundas, Ontario L9H 2P7
TEL: (905) 628-6412
FAX: (905) 628-6460

www.hullandhull.com
www.hullestatemediation.com

*Subscribe to **Hull & Hull LLP** blogs and podcasts at http://estatelaw.hullandhull.com*

The Moment of Death and Beyond: Preliminary Duties of the Estate Trustee

In the period directly following death, lawyers are infrequently consulted by estate trustees to advise regarding their administration of the estate. However, there are various issues that arise with respect to legal rights and obligations immediately following the death of the testator and the knowledge of the estate trustee's duties, as well as assistance of a lawyer, can be effective in avoiding unnecessary complications in the preliminary administration of the estate.

The Corpse

There is no property in a dead body and a corpse cannot be disposed of by a will.[1] However, after death, the estate trustee has a right of possession of the body for the purpose of its disposition. The right of the estate trustee to the possession of the remains of the deceased has priority over a surviving spouse or other family members.[2]

The *Vital Statistics Act* requires that the relevant documentation be obtained prior to any funeral, burial, cremation, or other disposition of the body.[3] A burial permit or cremation certificate is typically obtained from the municipality or coroner's office and required to dispose of the remains of the deceased by these means.[4] If further investigation into the circumstances of the death, such as an autopsy, is required, the remains cannot be disposed of until this work has been completed.

Who Makes Decisions Regarding Funeral and Arrangements for Disposition of Remains?

Decisions need to be made soon after death with respect to what will be done with the corpse of the deceased. The estate trustee and/or family members may need to make arrangements prior to discovering a will left by the deceased and the wishes of the testator shared therein.

The estate trustee has the authority to make decisions with respect to funeral and burial arrangements. Under section 29(1) of the *Estates Act*[5], if the will does not name an estate trustee, the court has the discretion to appoint the (a) spouse or common law partner of the deceased, (b) the next of kin, or (c) the partner and the next of kin.

---

[1] *Williams v. Williams* (1882), 20 Ch D 659.
[2] *Sopinka (Litigation Guardian of) v. Sopinka* (2001), 55 OR (3d) 529, 42 ETR (2d) 105 (Ont Sup C J) at para 31; *Hunter v. Hunter* (1930), 65 OLR 586 (Ont HC).
[3] RSO 1990, c V-4, s 22.
[4] Anne-Marie McLauchlan, "Everything You Ever Wanted to Know About the Law Related to Funerals" *The Law Society of Upper Canada Practice Gems: Probate Essentials* (September 19, 2013) at 19.
[5] RSO 1990, c E-21.

If there is no estate trustee and the court has not appointed a replacement, a surviving spouse will normally have the first right to dispose of the corpse of the deceased.[6] When there is no surviving spouse, the order of priority for other next-of-kin, with respect to deciding what will be done with the remains of the deceased, is generally:[7]

1) Adult children
2) Grandchildren
3) Great-grandchildren

And, where the deceased is not survived by a spouse or issue:

4) Parent(s)
5) Sibling
6) Grandparent(s)
7) Uncles, aunts, nephews, nieces, and great grandparents
8) The Public Guardian and Trustee

If there is an estate trustee, but he or she dies before disposing of the remains of the deceased, it will be the personal representative of the first estate trustee who will usually have the authority to make decisions regarding the burial or other disposition of both bodies.[8] This can be avoided by appointing multiple or alternate estate trustees, and by reminding clients to update their wills to reflect the failing health of individuals appointed as estate trustee.

In *Sopinka v. Sopinka*[9], these precautions were not exercised. The father of the deceased had been appointed as the estate trustee, but died soon after his son. The father left his wife, the son's mother, as his estate trustee, and she was responsible for the disposition of both of her dead relatives' remains.

The wife and mother in *Sopinka* made the decision to have her son's remains, which had already been cremated but had not yet been removed from the funeral home, interred within a coffin, along with his father's body. The son's children and wife brought an action to have the

[6] *Edmonds v. Armstrong Funeral Home Ltd.*, [1930] 3 WWR 649 (Alta CA).
[7] McLauchlan, *supra* note 4.
[8] *Saleh v. Reichert* (1993), 540 ETR 143, 104 DLR (4th) 384 (Ont C J (Gen Div)).
[9] *Supra* note 2.

ashes exhumed and buried separately. The action was dismissed, as the Court determined that the mother had not done anything inappropriate in dealing with the remains in this unusual manner, since it was not "inherently inappropriate."[10]

The Court recognized that an estate trustee or next-of-kin has a duty to dispose of the remains of the deceased with dignity. The individual who is making arrangements for the final disposition of the body, whether the estate trustee and/or a family member, is bound by an obligation to do so in a dignified manner.[11] Considering the bizarre burial accepted in *Sopinka v. Sopinka*, what the Court considers dignified appears to be somewhat liberal.

Where there is no will or the will appoints multiple estate trustees, disagreements frequently occur with respect to nature of the funeral and means of disposition of the deceased's remains.

Buswa v. Canzoneri[12] is a decision of the Ontario Superior Court, in which the siblings and daughter of the deceased disagreed as to the burial of his remains where the deceased had not left a will. The deceased had been a member of the Whitefish River First Nation and his siblings insisted that the burial be done in accordance with the Nation's religious practices, known as Anishnabekism. The deceased's daughter claimed, however, that the deceased was no longer a subscriber to Anishnabekism. All of the siblings and the daughter sought appointment as the estate trustee of the deceased's estate, and the daughter succeeded as the closest next of kin under the *Estates Act*. As the estate trustee, the daughter was able to choose how the deceased would be buried. The deceased was not buried in accordance with the tradition of the First Nation to which he allegedly belonged.

A typical will includes burial instructions, such as an indication that the testator wishes to be cremated or the name of a particular cemetery where the testator wishes to be buried. Funeral and burial instructions, included in a will, provided in writing elsewhere, or expressed orally during the deceased's life, are precatory and are not legally binding on an estate trustee. The estate trustee is bound only to dispose of remains in a way that is dignified.[13]

Burial, Cremation and Other Disposition of Remains

---

[10] *Ibid* at para 34.
[11] *Abeziz v. Harris Estate*, 3 WDCP (2d) 499, [1992] OJ No 1271 (Ct J (GD)).
[12] Buswa v. Canzoneri, 2010 ONSC 7137.
[13] *Sopinka*, supra note 2; *Abeziz*, supra note 11.

Burial in traditional cemeteries is still the most popular method of disposing of a body. However, recent years have seen the use of alternatives, especially natural or green cemeteries, gaining some momentum.[14]

When remains are cremated, ashes are usually kept in an urn at a cemetery, in a surviving loved one's home, or scattered in a place that holds some personal significance to the deceased. However, the place where the testator wished that his or her ashes be scattered is typically left out of a will, even where the desire to be cremated is indicated.

There is a common misconception that scattering one's ashes is illegal. In Ontario, ashes can legally be scattered on Crown lands or in navigable waters without a permit.[15] The ashes of the deceased cannot, however, be legally scattered on private land without the permission of the land owner or, in the case of municipally owned land, the permission of the town or city. Interment rights on private property cannot be sold by a person who is not licensed as a cemetery operator.[16]

Companies, such as the United Kingdom-based Crazy Coffins[17], offer specialized coffins that reflect the deceased's personality. The practice of creating personalized coffins was derived from Ghana, where caskets often represent the deceased in a way that takes into account the deceased's profession or community.

Caskets aren't the only receptacle of remains that can be personalized. Cremation Solutions[18] offers custom cremation urns that can be created in the three-dimensional image of the deceased or any other individual, produced based on as few as one photograph provided.

It is even possible to have a "memorial diamond" made out of the ashes of a loved one or pet.[19] Submitting the ashes to extreme pressure and heat results in the transformation of the ashes into a solid gemstone.

---

[14] McLauchlan, *supra* note 4 at 19.
[15] "Cemeteries and Funerals: Planning a Funeral, Burial, Cremation or Scattering" *Government of Ontario: Ministry of Consumer Services*, available at: http://www.sse.gov.on.ca/mcs/en/Pages/fbcsa_basics.aspx.
[16] Funeral, Burial and Cremation Act, SO 2002, c 33, s 4.
[17] Website available at: http://www.crazycoffins.co.uk/.
[18] Website available at: http://www.cremationsolutions.com/.
[19] *Ibid*.

Another alternative to scattering or interring ashes is to fly them out into space. Celestis Inc.[20] specializes in so-called "Memorial Spaceflights", during which ashes are placed in an aluminum capsule and launched from a rocket that travels within the Earth's orbit and beyond.

Many options exist for laying the remains of the deceased to rest. Estate trustees should be encouraged to follow the wishes of the testator expressed in any testamentary documents or communicated to them prior to death, but will have the final say when it comes to decisions regarding the ultimate disposition of the corpse. However, it appears that a court will enforce wishes and public policy against individuals who fail to make dignified arrangements.

Transporting Remains

Transportation of a corpse is subject to the rules of the transporter itself, be it an airline, train service, courier, or shipper.[21] Canada Post will ship cremated remains, but its Priority Worldwide Service will not ship human remains in any form.[22] Purolator similarly refuses to transport human remains.[23] The easiest way to transport remains outside of Canada may be to hire a service to have the remains flown to the destination, or to actually fly with the remains to ensure that they reach their destination without issue.

Organ and Tissue Donation

The deceased's intention that organs and/or tissue are to be donated for transplants or for scientific/medical research purposes if possible, should be included as a provision within a will or as a separate written statement.

The inclusion of instructions with respect to organ or tissue donation within a power of attorney for personal care is problematic, as the power of attorney, and the authority granted under it, terminates at death. The *Substitute Decisions Act* specifically denies an attorney for personal care the authority to make decisions with respect to organ donation.[24] These decisions are often left instead for grieving family members, who may be ill-equipped to make rational and timely decisions.

---

[20] Website available at: http://www.memorialspaceflights.com/.
[21] MacLauchlan, *supra* note 4 at 20.
[22] For more information, see http://www.canadapost.ca/tools/pg/manual/PGpriwor-e.asp.
[23] Purolator Terms of Service available at:
http://www.purolator.com/assets/pdf/legal/terms_conditions2_en.pdf.
[24] SO 1992, c 30, ss 66(14), 67.

More weight tends to be given to provisions indicating wishes when they are included within a will, but these documents are unlikely to be consulted when medical emergencies arise, and the wishes may not be known by estate trustees or family members until it is too late. Further, these provisions are not enforceable, and the next of kin or estate trustee will have the final call on whether these wishes will be followed.

It is possible to register consent for organ and tissue donation with the Trillium Gift of Life Network[25]. Once an individual registers, that information is accessible through the OHIP registry, which will be reviewed when a prospective donor is admitted to a hospital. The wishes will then be made known to the family members, should they be in a position to make a decision with respect to organ and tissue donation.

Pursuant to the *Trillium Gift of Life Network Act*[26], a declaration with respect to organ or tissue donation that is in writing and signed may be legally binding. However, if an estate trustee or family members are present at the time of death and object to a donation, the donation will not be accepted. Further, if there is more than one estate trustee, or one estate trustee with multiple family members present, and the individuals involved cannot come to an agreement with respect to the donation of organs or tissue, the donation will not be made, regardless of any registered consent to donate. This is but one instance where the selection of estate trustees who are willing to honour one's wishes, regardless of whether personal or religious beliefs are shared, is of significance.

The duty of a solicitor drafting the will is to inform the testator of options with respect to registering consent to organ donation and ways to best ensure that the desire that organs or tissue are donated is known by the individuals who will be making relevant decisions at the time of the testator's death. A lawyer for estate trustees should inform clients of the state of the law regarding organ donation and ask that they take the wishes of the testator into consideration.

The Preservation of Remains: Cryonics and Autopsies

The mention of cryonics may bring to mind visions of eccentric and ultra-wealthy individuals like Walt Disney or Ted Williams, who may or may not actually be frozen in time. However, due to the affordability of life insurance, the option of being frozen after death with the intention of being reanimated when cures exist for the relevant cause of death, has become more widely

[25] Website available at: http://www.giftoflife.on.ca/en/.
[26] RSO 1990, c H-20.

available. Most often, the cryonic company is named as the beneficiary of a life insurance policy, which pays the fee required by the company. The UK-based Cryonics Institute[27] and US-based Alcor[28] both encourage clients (who they refer to as "members" of their "community") to purchase life insurance policies to pay for cryonic services.

The circumstances under which one dies cannot always be controlled, however. For individuals who die in accidents during which the body is destroyed or lost, preservation is not likely to be a realistic option. Even where the body is left in a state amenable to preservation by freezing, the risk of autopsy may interfere with the intention of the deceased or their family members to have the remains cryogenically preserved.

Under the *Coroner's Act*, it is required that a death be reported to the Coroner's Office if associated with any of the following causes:[29]

1) Violence
2) Misadventure
3) Negligence
4) Malpractice
5) By unfair means
6) Pregnancy or childbirth
7) Any death that occurs suddenly and unexpectedly
8) Illness that was not treated by a medical practitioner
9) Any cause other than a disease
10) Under such circumstances as may reasonably require investigation

If the cause of death is unrelated to the above, further investigation is not required by legislation, and the wishes of the deceased not to be subjected to autopsy are made known to the coroner, it is likely that an autopsy can be avoided.

The Coroner's Office is dedicated to respecting the wishes of the deceased whenever possible, as long as they are not inconsistent with public policy. The Coroner's Code of Ethics supports

---

[27] Website available at: http://www.cryonics.org/.
[28] Website available at: http://www.alcor.org/.
[29] RSO 1990, c C-37, s 10.

the respect of the "beliefs and/or religious views of the deceased", when determining whether an autopsy is to be performed.[30]

If an individual wishes to avoid an autopsy, to improve prospects of preservation or for any other reason, such as the facilitation of organ donation or in accordance with religious beliefs, it is important that family members and the estate trustee are informed of these wishes and any beliefs upon which they are based. Wishes in writing will help support the position of the deceased and can be included within a will or a separate written declaration. A lawyer should be consulted when making such a declaration to ensure that it does not result in an unintentional revocation of a will that is already in place.

Gravestones and Cemeteries

The *Cemeteries Act* prohibits any private sale of burial plots or crypts. The "purchase" of a plot within a cemetery actually represents the interment rights, rather than the purchase of any outright property rights.[31] Most cemeteries offer a choice between the right to the interment of remains on a specified plot of land or within a crematorium, or scattering rights with respect to a specific region of the cemetery property.[32]

The estate trustee has a duty to erect, where applicable, a grave marker that is "consistent with the station in life of the deceased and the size of the estate...This duty also extends to what information is inscribed on the gravestone."[33] If the inscription is accurate and dignified, the duty should be considered to have been adequately discharged.[34]

A company based in the United Kingdom called Chester Pearce[35] offers to add Quick Response codes to gravestones that will link passersby to online memorials and other digital content relating to the deceased via mobile devices. It appears that with gravestones, as with coffins and cremation urns, the availability of alternative options offering personalization is increasing over time.

---

[30] Code of Ethics for Coroners, *Government of Ontario: Ministry of Community Safety & Correctional Services, Office of the Chief Coroner*, available at: http://www.mcscs.jus.gov.on.ca/english/DeathInvestigations/office_coroner/CodeofEthicsforCoroners/OCC_code_of_ethics.html at para 2.
[31] *(Revised)*, RSO 1990, c C-4.
[32] See the *Funeral, Burial and Cremation Services*, SO 2002, c 33, for more information.
[33] *Sopinka*, *supra* note 2 at para 39.
[34] *Ibid*.
[35] Website available at: http://www.chesterpearce.com/.

Perpetual Care of the Grave

In general, when a contract is entered into with respect to burial at a cemetery, the money is being paid not for the purchase of the plot, but for the rights to be interred in the specified plot of land. The cemetery owner retains the title of the land, and, pursuant to the *Cemeteries Act*, is responsible for its upkeep.

It is the responsibility of the owner of the cemetery property to maintain the cemetery and any crematorium on the property in "quiet and good order."[36] The cemetery owner is also responsible for the repair of gravestones that otherwise pose a risk to public safety.[37] If the cemetery owner does not provide adequate maintenance of the grounds, the municipality in which the cemetery is located can order the restoration of the property by its owner.[38]

The perpetual care typically offered through a contract with a cemetery owner is limited in scope, often including little more than the landscaping of the surrounding area. The duty of the cemetery owner to repair gravestones does not extend to those required for aesthetic reasons. Services are available for estate trustees who wish to have the grave site more frequently and thoroughly tended to and cleaned.

Some cemetery owners may insist that gravestones are insured, in order to transfer the responsibility for the upkeep of markers and to limit their liability for accidents occurring as a result of disrepair of gravestones. However, in a 2006 decision by the Alberta Court of the Queen's Bench, the legislation that parallels Ontario's *Cemeteries Act* was applied to impose a duty of care upon the owner of the cemetery, holding the cemetery owner liable for an injury caused as a result of a neglected gravestone.[39] It follows that cemetery owners can be held to fulfill their obligation to keep a cemetery in an acceptable state and good order.

Payment of Funeral and Burial/Other Expenses

Funeral and burial expenses are to be repaid before the repayment of any other debts for which the estate may be liable, even when the estate may be insolvent, and prior to the distribution of the estate assets. "Reasonable funeral and testamentary expenses incurred by the legal

---

[36] Cemeteries Act, supra note 31, ss 46, 57.
[37] *Ibid*, s 48.
[38] *Ibid*, s 59(1).
[39] *Pauk v. Catholic Parish of Saint Nykolaja of Greek Ruthenian Rite To Rome*, 2006 ABQB 487, 63 Alta LR (4th) 156.

representative" are the first priority in the repayment of debts by an insolvent estate.[40] If the estate is suspected to be insolvent, an estate trustee should be advised to ensure that the funeral expenses incurred are reasonable under the circumstances, in order to limit any risk of non-repayment. There is some controversy with respect to what sort of ceremony and disposition is reasonable.

The City of Toronto offers assistance where the estate lacks the assets necessary to cover funeral costs.[41] Eligibility for assistance programs is based on the deceased's financial situation and that of his or her spouse. An individual will generally be eligible for this assistance if he or she was receiving Ontario Works or Ontario Disability Support Program benefits prior to death, but this is not necessarily a precondition to eligibility. The city-based program can pay for the transportation of the body, the purchase of a burial lot, the opening and closing of a grave, and/or cremation and a basic cremation urn. The City of Toronto will contribute approximately $2,000 to cover related expenses, but the average funeral in Ontario costs more than $5,000.

One way that individuals can take control and help ensure that wishes are followed is to make the funeral and burial arrangements and payments themselves prior to death. If the funeral and burial have already been planned and paid for before any of these decisions need to be made by the estate trustee, the arrangements in place are highly unlikely to be disrupted. The testator should advise the estate trustees and immediate family members orally of any arrangements already in place and of any further wishes.

Advantages to pre-planning one's own funeral may also include tax benefits with respect to eligible funeral expenses, but the interest accumulated is minimal, with little or no input by the individual into how the money is invested prior to death.

There are currently nearly $2 billion dollars in prepaid funeral service contracts within Ontario alone, with almost 40% paid in cash held in trust and just over 60% to be funded by life insurance proceeds.[42]

Funeral insurance may be an attractive option to individuals who wish for their bodies to be sent back to their homeland following death and whose families may not be able to bear the costs of

---

[40] *Bankruptcy and Insolvency Act*, RSC 1985, c B-3, s 136(1)(a).
[41] "Help with funeral costs" *City of Toronto*, available at: http://www1.toronto.ca/wps/portal/contentonly?vgnextoid=8579707b1a280410VgnVCM10000071d60f89RCRD&vgnextchannel=0ebe83cf89870410VgnVCM10000071d60f89RCRD&vgnextfmt=default
[42] McLauchlan, *supra* note 4 at 21.

transporting their body. Prevision Exequial[43] sells funeral insurance to Columbian immigrants living in the United States and guarantees the transport of the deceased's remains back to Columbia.

Application to the Court for Probate

The Certificate of Appointment of an estate trustee is issued when a will is successfully admitted to probate. Evidence must be presented with respect to the fact, date, and place of the death. In producing the Certificate of Appointment, the court finds that the estate trustee has been appointed under the last will of the testator and, most importantly, confirms the validity and the terms of the will.

The Certificate of Appointment can be required to prove the above findings to any individuals who enter into financial transactions with the estate trustee.

Probate will not be required in respect of every estate. Whether a Certificate of Appointment is required will depend on the type of assets held, the value of assets, and the manner in which the assets are owned. Probate will not be required to give effect to transfers of ownership to a joint owner or pursuant to a beneficiary designation for a life insurance policy or RRSP. With land and other investments, probate is more likely to be required.

The probate application will include the original will, an affidavit of execution sworn by one of the witnesses to the will, and an application outlining information relating to the deceased, the estate trustee, and the value of the estate. The application must be sworn before a lawyer or notary, and will often be prepared by a solicitor, if one is retained by the estate trustee. When the probate application is filed with the court, estate administration taxes, in the amount of approximately 1.5% of the value of the estate, will be payable.

If a will is being admitted to probate, there is nothing that can be done by the estate trustee or his or her lawyer to prevent the will from becoming a matter of public record.

Advertising for Creditors

There is no general statutory duty that an estate trustee must advertise to creditors of the estate. However, there are situations where advertising to creditors may be either beneficial, required, or both:[44]

---

[43] Website available at: http://www.previsionexequialcolombia.com/.

1) An estate trustee may wish to limit his or her personal liability with respect to claims by creditors of the estate after the distribution of estate assets. The estate trustee is otherwise liable for claims that could have been protected against by advertising to creditors.

2) Where there is an intestacy, following which the estate trustee wishes to make distributions from the estate prior to one year following the death of the intestate, the *Trustee Act* states that the trustee must advertise for creditors before making such interim distributions.[45]

3) Advertising to creditors is often required if the estate trustee wishes to pass accounts before the court.

4) If an Administration Bond has been posted and the estate trustee wishes to have it discharged.

The advertising for creditors should be included in a newspaper of general circulation. Local newspapers are often less expensive, but also less far-reaching than national newspapers with good circulation throughout the country, such as the *Globe and Mail* or the *Toronto Star*. With smaller newspapers, it may be necessary to first inquire with the newspaper to determine whether its circulation numbers for the region where creditors are suspected to live are sufficient.

The notice will normally be published three times in a daily newspaper, with at least one month from the first publication before the deadline for the filing of claims against the estate. The representative of the newspaper will swear an affidavit that is provided to the solicitor for the estate as evidence that the advertisement was published.

An estate trustee has a duty to act in good faith. If it is known that a specific creditor exists and where that creditor is located, the creditor should be contacted directly to ensure that the debt is paid off. Advertising cannot be relied on as protection from liability in all circumstances.

It should also be remembered that advertising for creditors protects only the estate trustee. Creditors are still able to bring actions against beneficiaries who have received distributions

---

[44] Anne Armstrong, *Estate Administration: A Solicitor's Reference Manual*, Toronto: Carswell, ch 3.15.2.
[45] RSO 1990, c T-23, s 53.

from the estate. Therefore, if there is only one estate trustee who is also the sole beneficiary, advertising for creditors is of little relevance.

Absent advertising for creditors, the estate trustee may be liable for the debts and liabilities of the estate. If the advertising is done properly, the liability of the estate trustee will be effectively limited.

Realization of Assets – the Executor's Year

The "Executor's Year", which begins at the death of the testator, refers to the common-law rule under which an estate trustee must administer the estate and transfer assets without accrued interest to be paid to the beneficiaries.[46] If all property is not realized during the one-year period, the estate trustee must provide a valid explanation for the delayed administration.[47] Where there is no will or estate trustees appointed pursuant to the will are unable or unwilling to act, the Executor's Year will begin running at the date that the Certificate of Appointment is issued.

The Court in *Currie v. Currie Estate* summarized the duty of an estate trustee with respect to the realization of assets during the Executor's Year:

> "The executor must not unreasonably delay in getting the assets and settling the affairs of the estate and he will be personally responsible for any loss occasioned by undue delay. There is no hard and fast rule as to what constitutes undue or unreasonable delay, but it is the practice to speak of the executor's or administrator's year and the courts attach importance to the question whether the alleged failure to convert or realize assets which resulted in the loss to the estate occurred within or beyond a year. Therefore, all investments which are not proper to retain should be realized within a year of the testator's death or, in the case of an administration, within a year of the date of the grant."[48]

It is becoming increasingly common for a testator to leave behind digital assets at death. An estate trustee should make inquiries with respect to the testator's online accounts and information stored within electronic devices, if such information is not made readily available to

---

[46] Brian A Schnurr, *Estate Litigation*, Toronto: Carswell, ch 123.4.
[47] *Ibid*.
[48] 2005 PESCTD 64, 759 APR 178 at para 45.

them. Digital assets may have substantial value or be sentimentally significant to the beneficiaries of the estate. Typical methods employed in order to discover estate assets may be insufficient to uncover these digital aspects.

Conclusion

Choosing an estate trustee who will honour one's wishes is, of course, a great way to improve the chances that the decisions to be made immediately following death are made the way the estate plan sets out. Clients should also be encouraged to discuss their wishes with estate trustees so that decisions are more likely to be made in accordance with their wishes.

When representing an estate trustee, it is important that the trustee is informed of his or her duties with respect to the administration of the estate as soon as possible after the death of the testator. Although they may not be legally enforceable, the estate trustee should be encouraged to act in compliance with any known wishes of the testator.

5790072